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## CONFIDENTIAL COMMUNICATION FOR SETTLEMENT PURPOSES ONLY

June 4, 2010

Craig Melodia, Esq.  
Assistant Regional Counsel  
USEPA - Region 5  
77 West Jackson Blvd. (C-29A)  
Chicago, IL 60604-3590

Re: Ashland Lakefront Site ("Site")

Dear Craig:

This follows my letters to you of December 9, 2008 and November 20, 2009 (copies of which are enclosed) issued on behalf of our client, Northern States Power Company-Wisconsin ("NSPW"), concerning the NSP Ashland Lakefront Site ("Site") as well as your recent discussions with Ms. Kristen Carney. Those prior letters, as well as NSPW's previously issued PRP Investigation Report<sup>1</sup>, address the roles of other Potentially Responsible Parties ("PRPs") at the Site. As you know, this has been the subject of many of our prior discussions and we appreciate your willingness to consider all of the information we have supplied you. In light of those past discussions, you solicited our views on the question of allocation of future response costs at the Site. To be responsive, NSPW commissioned Gradient Corp. ("Gradient") to undertake a comprehensive review of Site history, Site data and anticipated future response costs.

Enclosed for the Agency's review and consideration is Gradient's report titled "Allocation of Environmental Response Costs at the Ashland NSP Lakefront Superfund Site," dated June 2, 2010 ("Allocation Report").<sup>2</sup> The Allocation Report details the methodologies Gradient employed to develop an environmental response cost allocation and the major conclusions that arise as a result. We look forward to presenting the information from this report to you in our meeting scheduled for 10:00 a.m. on Monday, June 21<sup>st</sup> in Chicago.

The methodologies and allocation factors Gradient employed are well supported by precedent. As described in greater detail in the Allocation Report, Gradient developed the allocation using USEPA approved site characterization data and available information concerning past operations and releases of hazardous substances at the Site. As for factual/historic underpinnings, Gradient reviewed the USEPA approved Remedial Investigation/Feasibility Study (RI/FS) Report, the PRP Investigation Report and responses provided to the Agency's

<sup>1</sup> At USEPA's request, NSPW submitted its PRP Investigation Report dated June 20, 2006, together with Addenda dated May 31, 2007 and July 9, 2008 (collectively hereinafter referred to as the "PRP Investigation Report").

<sup>2</sup> We have also enclosed a CD containing an electronic version of the Allocation Report.

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information requests issued pursuant to § 104(e) of CERCLA, along with a variety of other historic and Agency sources, all of which are referenced in the Allocation Report.

The major conclusions from the Allocation Report are as follows:

- The cause of the harm at the Site is divisible based on distinct geographies (Upper Bluff, Kreher Park and Sediments), operational histories and the chemical signatures of the contaminants<sup>3</sup>;
- The contamination in the Sediments is strongly correlated to the source contamination found in Kreher Park and dissimilar from the source contamination found in the Upper Bluff;
- The remedial cost driver in each of the three distinct Site areas is the presence of NAPL and each of the primary PRPs are responsible for its presence;
- The primary PRPs' individual share of the divisible harm has been determined and then translated into shares of future response costs that have been estimated<sup>4</sup> for each of the three distinct Site areas;
- The following parties are the primary PRPs at the Site:

The John Schroeder Lumber Company  
NSPW  
County of Ashland  
City of Ashland and its Contractors  
Soo Line/Canadian Pacific Railroad  
Canadian National Railroad  
US Army Corps of Engineers

<sup>3</sup> That multiple sources of hazardous substance releases occurred at the Site is a view held by both the Agency and the State of Wisconsin. See, e.g., PRAP at pp. 1, 3-4 (June 2009); See also Stipulation and Order for Judgment, *State v. NSPW*, Ashland Co. Cir. Court Case No. 04-CV-118 March 24, 2009, Par. 3(e) "That the State [of Wisconsin] and WDNR acknowledge to the public and to the [USEPA] that NSPW, or its predecessor, affiliated companies or parent company are not responsible for all of the discharges of hazardous substances detected at the [Site] and that a portion of those discharges was caused by the activities of others."

<sup>4</sup> Gradient allocated shares of responsibility by distinct Site area and then ascribed a "cost allocation" or "cost percentage" by utilizing the estimated future costs provided in the USEPA PRAP for the Site (June 2009). On August 17, 2009, NSPW issued significant comments objecting to the remedy suite proposed in the PRAP and Gradient's use of the future costs in the Allocation Report should not be construed as an endorsement of the PRAP or a waiver by NSPW of its previously issued comments. Indeed, as Gradient notes, once derived, the allocable shares can be translated to cost -- resulting in a "response cost allocation" -- regardless of the ultimate cost of the remedy selected in the Record of Decision.

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- There are several defunct PRPs at the Site, including Schroeder and City contractors such as Roffers Construction and E.W. Coons;
- The allocation results are well-supported and certain because the results are confirmed when viewed both as individual allocation approaches as well as in concert through a weight of evidence approach. Moreover, the results were subjected to sensitivity analyses and even by varying key input assumption parameters well beyond their expected/reasonable range, the allocation results remain sound.

The methodology and conclusions for allocating response costs at the Site as reflected in the Allocation Report are consistent with the method described in the U.S. Supreme Court's *BNSF* decision.<sup>5</sup> In *BNSF*, the Supreme Court reviewed the evolution of the divisibility of harm analysis applicable to CERCLA jurisprudence in the context of a case which raised the question, in the Court's words, of "whether and to what extent a party associated with a contaminated site may be held responsible for the full costs of remediation." *Id.* at 1875. Citing § 433A of the Restatement (Second) of Torts, the Court concluded that apportionment is proper under CERCLA when there exists a "reasonable basis for determining the contribution of each cause to a single harm." *Id.* at 1881. In an eight to one decision<sup>6</sup>, the Court upheld the District Court's allocation of liability in *BNSF* because a reasonable basis existed to apportion the harm at that site based on three factors: 1) the surface area of the site that the responsible party utilized, 2) duration of operations, and 3) the volume of hazardous-substance releasing activities. The Supreme Court concluded that this apportionment was reasonable given the facts contained in the record and further concluded that precise calculations were not necessary to reach an allocation of a divisible harm. The Court also agreed that if adequate information is available, divisibility may be established by other criteria such as volumetric, chronological or other types of evidence, including geographic considerations.<sup>7</sup> As you review the Allocation Report, you will note that many of these same factors cited by the Supreme Court are present in this case and provide reasonable bases upon which to apportion the harm at this Site.

As you are also aware, the existence of significant "orphan shares" as a result of defunct PRPs - primarily Schroeder Lumber -- is also a particular hurdle at this Site -- a site where many PRPs (including owners, operators and arrangers) have potential responsibility for the cleanup. We believe these factors as well as equitable considerations, such as NSPW's cooperation with the government and expenditure of more than \$19 million to date at the Site to conduct both RI/FS work and two interim actions, should be taken into consideration as we approach the anticipated

<sup>5</sup> *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1879 (2009).

<sup>6</sup> Although Justice Ginsburg dissented, her dissent was to the Court's procedural disposition of the case, not its reasoning. Justice Ginsburg "would return these cases to the District Court to give all parties a fair opportunity to address that court's endeavor to allocate costs." *Id.* at 1886.

<sup>7</sup> See also, *United States v. Broderick Investment Co.*, 862 F. Supp. 272 (D.Col. 1994); *Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889 (5<sup>th</sup> Cir. 1993); *Akzo v. Aigner Corp.*, 197 F.3d 302 (7<sup>th</sup> Cir. 1999); *United States v. Township of Brighton*, 152 F.3d 307 (6<sup>th</sup> Cir. 1998).

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consent decree negotiations following ROD issuance. Given the Agency's litigation risk in light of the divisible harm at this Site, we believe those negotiations should proceed not only expeditiously, but also with creativity and flexibility as is suggested by the Agency's Interim Policy on Managing the Duration of [RD/RA] Negotiations (Sept. 2009). We also note that a couple of the parties identified in the Allocation Report have yet to receive § 104(e) Requests for Information. We believe it appropriate to ask that the Agency issue such requests to these parties to determine if further relevant information is available. Any RD/RA work settlement involving NSPW will need to include the significant participation by the Government and other viable PRPs in funding the project.

We ask that you please consider this information and that we then schedule a time to meet to discuss next steps.

Very truly yours,

**MICHAEL BEST & FRIEDRICH LLP**



David A. Grass

Enclosures

cc: Thomas Benson, Esq. (USDOJ) (w/encl.)  
Kristen S. Carney, Esq. (w/out encl.)

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